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In The

Supreme Court of the United States

MARIO CLAIBORNE,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

Was the district court's choice of below-Guidelines sentence reasonable?

In making that determination, is it consistent with *United States v. Booker,* 543 U.S. 220 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?

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The Court of Appeals's opinion is reported at *United States v. Claiborne*, 439 F.3d 479 (8th Cir. 2006), and is reproduced in the joint appendix hereto at pages 88 through 91. The Court of Appeals's denial of the petition for rehearing is reproduced on page 93 of the joint appendix.

JURISDICTIONAL STATEMENT

A panel of the Court of Appeals entered its judgment on February 27, 2006. On April 27, 2006, the Court of Appeals denied the petition for rehearing and the petition for rehearing *en banc*. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ."

The relevant portions of the Sentencing Reform Act, as amended, 18 U.S.C. §§ 3553(a), (b)(1) & (c), 3661; and 21 U.S.C. §§ 841(a), (b)(1)(C), and 844(a), are included as an appendix to this brief.

STATEMENT OF THE CASE

I. Mario Claiborne

Now age 23, Mario Claiborne is currently living in St. Louis, Missouri, following his May 1, 2006 release from the Bureau of Prisons's custody upon completion of the 15-month sentence he received in this case. Re-sentencing proceedings, following the court of appeals's remand, have been stayed in the district court pending the outcome in this Court.

A St. Louis native, Claiborne lives with his girlfriend and their two children, and his girlfriend's older child. Joint Appendix ("JA") at 20; II-7. Their stable, five-year relationship has survived his prison sentence. They are a close-knit family, with two working parents who share child-rearing responsibility for all three children. JA at 20. Claiborne's parents separated when he was eight years old, which coincided chronologically with his failing third grade. JA at 20. From kindergarten through eighth grade, he attended six different elementary schools before dropping out of school in the ninth grade. JA at 20.

Currently employed, Claiborne has, in his own words, "always worked." JA at II-8. He was employed while on pretrial and pre-sentencing release in this case, and before that worked for his father and for a number of temporary employment agencies. JA at II-8.

His only brushes with the criminal justice system occurred as a result of the incidents for which he was convicted in this case. He has no juvenile criminal record and no other adult criminal history. JA at II-6.

II. Criminal Proceedings

On May 14, 2003, Mario Claiborne sold a single rock of cocaine, weighing 0.23 grams, to an undercover police officer. JA at 14. Arrested immediately after this offense, he was referred to the Drug Court Program in the City of St. Louis. JA at 14; II-6. About six months later, on November 3, 2003, he was arrested again, this time for possession of crack. He was standing on the front porch of a residence when police approached. JA at 14-15. He tossed a bag containing 5.03 grams of crack in the officers' presence and fled into the residence. *Id.* Exiting the rear, he fled from police on foot. During the pursuit, he saw an open door of a house belonging to a woman he knew from the neighborhood, entered her house without invitation, and immediately exited the rear. JA at 47, 60. Claiborne was unarmed, touched no one, and neither used nor threatened violence to anyone. JA at 56-57, 60-62. He was in the residence only long enough to run in the open front door and out the rear door. *Id.* The Drug Court Program terminated Claiborne the following day. JA at II-6.

Approximately 10 months after this arrest, a federal grand jury returned a one-count indictment against Claiborne charging him with possessing the 5.03 grams of crack on November 3, 2003, with intent to distribute. JA at 1, 5-6. He was released on bond on September 8, 2004. JA at 1; II-1. A month later, after the parties were unable to work out a plea agreement, the government obtained a superseding indictment, which charged the May 14, 2003 incident in Count One and the November 3, 2003 incident in Count Two. JA at 1, 7-9, 66.

Claiborne pled guilty to both counts, without a plea agreement. The parties stipulated to the applicable statutory

penalties. JA at 11. For Count One, distribution of a controlled substance, 21 U.S.C. § 841(b)(1)(C) sets a range of punishment from zero to 20 years imprisonment. For Count Two, possession of a controlled substance, 21 U.S.C. § 844(a) required a mandatory five-year minimum sentence and set a maximum sentence of 20 years imprisonment. The three-hundredths of a gram by which the weight of the crack cocaine recovered on November 3, 2003, exceeded 5 grams, triggered the five-year mandatory minimum sentence. *See id.* Had the bag weighed five grams or less, the statutory maximum would have been one year. *See id.*

At sentencing, the district judge, over the government's opposition, ruled that Claiborne qualified for the safety-valve exemption, U.S.S.G. §5C1.2; §2D1.1(b)(7), from Count Two's mandatory minimum sentence. JA at 60-62. The district judge ruled that Claiborne (1) had no criminal history points; (2) had not used or threatened violence or possessed a weapon; (3) did not cause any injury; (4) did not supervise, manage, lead, or organize other criminal actors; and (5) offered the government all information he had concerning the offense. *See id.*; U.S.S.G. §5C1.2. In addition, the district judge rejected the government's request for a sentence enhancement under U.S.S.G. §3C1.2 for reckless endangerment during flight. JA at 62. The judge concluded that Claiborne's offense level, reduced by five points for the safety valve and acceptance of responsibility was 21, which, with zero criminal history points, resulted in a Sentencing Guideline range of 37 to 46 months. JA at 69.

Defense counsel urged the district court to impose a sentence more lenient than the Guidelines called for, noting, among other things, the disparate treatment of

cocaine base compared to cocaine powder. JA at 63-67. Counsel stressed the unreasonableness of the 100:1 drug quantity ratio between powder and crack cocaine employed by the advisory Sentencing Guidelines and pointed to the conclusions of the United States Sentencing Commission that this disparate treatment "cannot be justified." JA at 22; 63-65. Had Claiborne been charged with a total of 5.26 grams of cocaine powder rather than crack cocaine, counsel noted, the Guideline range would have been 6 to 12 months. JA at 65. Counsel also pointed out Claiborne's success supporting his family while on bond and urged the court "to continue the momentum of that success" by sentencing him "considerably lower than what the guidelines would call for." JA at 65-67. The district court agreed that the Guideline range was excessive, JA at 71, and offered a detailed explanation for this conclusion:

> I am concerned that the Sentencing Guidelines, while they take into account a lot of factors, in this situation, the 37-month low end of the range is, in my view, excessive in light of your criminal history which is zero and in light of the circumstances involved in this case. I don't want to minimize what you did, because what you did was very serious. You committed two serious felony crimes.
>
> However, when I consider the quantity of drugs that are involved; the fact that you qualify for the safety valve; and your criminal history; and the likelihood of your committing further similar crimes in the future, I come to the conclusion that a 37-month sentence would be tantamount to throwing you away.
>
> I don't think that's appropriate in your situation. And when I compare your situation to that

> of other individuals that I have seen in this court who have committed similar crimes but perhaps involving a larger – much [larger] amount of drugs – and the sentences that they receive, I don't believe that 37 months is commensurate in any way with that.

JA at 71-72. The district court imposed concurrent 15-month sentences to be followed by a three-year supervised release term with drug testing and counseling. JA at 71.

The government appealed, arguing only that the district court's variance from the Guidelines range was unreasonable. JA at 88. A panel of the Eighth Circuit agreed. It held that because "the Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study," the range recommended by the Guidelines "is presumed reasonable." JA at 90. Sentences varying from that range, the court continued, "'are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. § 3553(a).'" JA at 90. It further noted that "'[h]ow compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed.'" JA at 90.

The court of appeals labeled Claiborne's sentence an "extraordinary variance" because the 15 months that Claiborne received is 60 percent lower than the 37-month low end of the range. JA at 90-91. It held that this variance was not supported by the requisite "extraordinary facts." JA at 91. The court of appeals ignored the district court's concern that a 37-month sentence would be tantamount to "throwing [Claiborne] away." JA at 90-91. Rather, it determined that the circumstances of the offenses, particularly their being committed within a few

months of one another, demonstrated that Claiborne "has not earned an extraordinary downward variance from a guidelines sentence." JA at 91. It held that the relatively small amount of drugs involved in the transactions could be considered only in calculating the Guidelines range, and intimated that further consideration would constitute double counting. JA at 91. Astonishingly, the court then rendered its own factual findings in support of a lengthier sentence, finding that "it is a fair inference that Claiborne distributed additional quantities of cocaine during the six months between" the two crimes. JA at 91. Despite the lack of any evidence in the record for this proposition, the court of appeals relied on it to hold that Claiborne's sentence was unreasonable. JA at 91.

SUMMARY OF ARGUMENT

In sentencing Mario Claiborne, the district court complied in all respects with the sentencing process required by *United States v. Booker*, 543 U.S. 220 (2005), to cure the Sixth Amendment violation caused by the mandatory Sentencing Guidelines. The judge's inquiries and explanations confirm that she considered all factors listed in 18 U.S.C. § 3553(a) to choose a sentence "sufficient but not greater than necessary" to accommodate them, as *Booker* envisioned. The judge assessed the nature of the case, noting the small drug quantity involved, and confirmed the lack of violence, weapons, or physical force. She reviewed Claiborne's background, including his lack of juvenile or other criminal record, plus his full-time employment and parenting throughout his pre-trial release. The judge gauged his likelihood of re-offending to be low. By calculating and considering an advisory Guidelines

range of 37-to-46 months, the judge satisfied section 3553(a)(4). In addition, she considered the need to avoid unwarranted disparities as section 3553(a)(6) directs, comparing Claiborne's case to others she had seen. Ultimately, she concluded that imposing a Guidelines term would be tantamount to throwing away Claiborne's rehabilitative prospects. She chose a 15-month prison term as sufficient but not greater than necessary to accomplish the statutory sentencing purposes. The judge added three years of supervised release with conditions of drug treatment and completion of his G.E.D., thus addressing the needs of protecting the public from future crimes and providing deterrence, correction, and education in the most effective manner. 18 U.S.C. § 3553(a)(2)(B - D).

Post-*Booker* reasonableness review grants substantial deference to the district court's exercise of informed discretion. The examples the Court cited to illustrate this standard all evidence a highly deferential appellate posture concerning the district court's decision whether to follow or vary from advisory Guidelines. The effectiveness of the *Booker* remedy depends on the district court's exercise of reasoned discretion, and deference to the district court's choice.

The court of appeals instead substituted its judgment that the Guidelines set a presumptively reasonable range incorporating all section 3553(a) factors, from which no extraordinary circumstances justified a 60 percent variance. JA at 91. In fact, the Guidelines did not incorporate the other relevant section 3553(a) factors, but, rather, prohibited and discouraged consideration of the individual circumstances upon which the district court relied. Rather than defer to the district court's superior vantage point to gauge those considerations, the Eighth Circuit did not

mention the district court's reliance on her experience sentencing other defendants and her assessment of Claiborne's capacity to recover from a longer sentence. In fact, the Eighth Circuit applied its own finding that Claiborne probably engaged in additional crimes, of which neither proof nor allegation existed.

The Eighth Circuit's approach rests on the false premise that this Court intended "reasonableness" review to limit the range of choice available to judges considering section 3553(a). Requiring "extraordinary justification" for non-Guidelines sentences negates the expanded district court discretion the *Booker* remedy required to render the prior presumptive Guidelines system "effectively advisory." This approach subjugates a district court's discretion evaluating section 3553(a) factors to the Guidelines grid, much as section 3553(b) did before *Booker*. Nothing in *Booker* or section 3553(a) supports a preeminent position for the Guidelines. Employing a simplistic, arithmetic measure of a district court's decision to vary from the Guidelines, the court of appeals ignored the focus on section 3553(a) that *Booker* requires. This approach elevates the bare assertion by a court of appeals that "the Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study," JA at 90, above the superior vantage point and experience of a district judge who met and assessed the individual in question and hundreds of others besides. It negates the significance of section 3553(a) factors the appellate courts have little basis to evaluate, while reinstating the preeminence of the Guidelines grid. The Eighth Circuit's decision, therefore, must be reversed.

ARGUMENT

I. The district court's choice of a below-Guidelines sentence was reasonable.

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the mandatory Federal Sentencing Guidelines violated defendants' Sixth Amendment right to a jury because they required judges, rather than juries, to find the facts used to enhance sentences. *See* 543 U.S. at 245. To cure this constitutional defect, the Court excised 18 U.S.C. § 3553(b)(1), the provision that required district courts to impose sentences within the applicable Guideline range absent a circumstance of a kind or degree not taken into consideration by the Commission in formulating guidelines. *See* 543 U.S. at 259. In rendering the Guidelines thus advisory, the Court directed district courts to sentence defendants pursuant to the sentencing purposes and factors in 18 U.S.C. § 3553(a). *See* 543 U.S. at 245-46. "So modified, the Federal Sentencing Act, see Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551 *et seq.*, 28 U.S.C. § 991 *et seq.*, makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." 543 U.S. at 245-46; *see also id.* at 259-60.

Section 3553(a) opens with the command that district courts "shall impose a sentence sufficient, but not greater than necessary, to comply with the [four] purposes in paragraph (2) of this subsection." 18 U.S.C. § 3553(a). As *Booker* summarized, the four purposes in section 3553(a)(2) "require[] judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence,

protect the public, and effectively provide the defendant with needed educational or vocational training and medical care." *Booker*, 543 U.S. at 260. The statute's second command is that district courts consider all of the factors enumerated in 3553(a)(1) through 3553(a)(7). *See* 18 U.S.C. § 3553(a). Apart from its opening command to impose a sentence sufficient but not greater than necessary, the statute's language suggests nothing to indicate that any single factor or purpose should predominate or control the district court's exercise of sentencing discretion and judgment. *See id.*

After *Booker*, the first question in assessing the lawfulness of the sentence in a particular case is whether the district court complied with its duties under section 3553(a). Compliance does not turn on an assessment whether the district court believed its sentence to be "reasonable." Congress did not write the word "reasonable" or the word "reasonableness" into section 3553(a) and *Booker* did not add words to the statute. A district court fulfills its post-*Booker* sentencing duties by considering each factor in section 3553(a) and offering a reasoned elaboration of its judgment sufficient for the court of appeals to apply the post-*Booker* standard of appellate review "to determine whether the sentence 'is unreasonable' with regard to § 3553(a)." 543 U.S. at 261.

Examination of the record in Claiborne's case reveals that the district court met this standard. It considered the relevant factors directed by section 3553(a) and imposed a sentence that, in its view, was "sufficient but not greater than necessary" to satisfy the statutory purposes of sentencing.

A. The district court followed this Court's remedial opinion in *United States v. Booker*, 543 U.S. 220 (2005), by considering the sentencing factors in 18 U.S.C. § 3553(a), and choosing, in compliance with section 3553(a)'s command, a sentence sufficient but not greater than necessary to comply with section 3553(a)(2)'s sentencing purposes.

1. The district court considered section 3553(a)'s sentencing factors.

Resolving Sentencing Guidelines issues at the outset of Claiborne's sentencing hearing, the district judge demonstrated that she understood the nature of the crimes to which he pled guilty and their circumstances. *See* JA at 56-57, 60-62; 18 U.S.C. § 3553(a)(1) (nature and circumstances of the offense); § 3553(a)(4) (Sentencing Guidelines). In particular, she noted the "quantity of drugs that are involved." *See* JA at 72. And, the amounts are relatively small. The May 14, 2003 sale involved a single rock of crack cocaine weighing only 0.23 grams. JA at 14. The 5.03 grams of crack involved in the November 3, 2003 possession, is a bare three-hundredths of a gram above an amount that would have permitted a maximum sentence of only one year. *See* JA at 14; 21 U.S.C. § 844(a).

The Presentence Investigation Report told the district court that Claiborne had no criminal history, JA at II-6, a fact the district judge recognized by finding that he qualified for the safety valve and incorporated into the reasons for her sentence. JA at 61-62, 71. Although the Presentence Investigation Report contained little information about Claiborne's educational history, JA at II-8, the district judge knew from Claiborne's pleadings that he had attended six different elementary schools and dropped out

of school in the ninth grade. JA at 20. Accordingly, the district court, in admonishing Claiborne to meet his responsibilities legitimately, also challenged him to improve himself by requiring him to obtain a GED. *See* JA at 70-73; 18 U.S.C. § 3553(a)(1) (history and characteristics of the defendant). In addition, she ordered him to continue the drug counseling that had been a condition of his bond when he completed his prison sentence and began the three-year supervised release term. *See* JA at 73, II-8.

The record abundantly corroborates the district judge's explicit assertion that she had considered the Sentencing Guidelines. JA at 62. "I think the guidelines are certainly instructive and will provide some guidance to the Court in determining what's an appropriate sentence in this case." *Id.* In addition, she addressed section 3553(a)(6)'s directive to avoid unwarranted sentencing disparities, specifically mentioning this concern as part of her balance of factors leading to Claiborne's sentence. JA at 72.

The district judge's findings concerning the absence of violence and weapons reflected her belief that Claiborne's case evidenced none of the behaviors that some have argued as justification for the penalty differentials between crack and powder cocaine. *See* JA at 21, 60-63, 72. *See* United States Sentencing Commission, *Report to Congress – Cocaine and Federal Sentencing Policy* at vii (May 2002) ("2002 Report"). She understood that he was a small-scale street dealer. *See id* at 45. Typical of this very ordinary drug offense, there was no victim who suffered financial loss, JA at II-10, but the court ordered Claiborne to write a letter of apology to the owner of the house through which he ran on November 3, 2003. *See* JA at 73;

18 U.S.C. § 3553(a)(7) (the need to provide restitution to victims).

Addressing Claiborne directly, the district judge noted the importance of his family and his responsibilities to them. *See* JA at 70; 18 U.S.C. § 3553(a)(1) (defendant's history and characteristics). From the Presentence Investigation Report, she knew that he had "always worked," and had full time employment at the time of sentencing, a job he had obtained promptly after being released on bond. JA at II-8. She focused on his desire to support his family, knowing from both the Presentence Investigation Report and Claiborne's pleadings that he and his girlfriend lived together with their two children and his girlfriend's older child, whom Claiborne also supported. JA at 20, II-7. In this context, she stressed her belief that the imprisonment she believed it was necessary to impose sufficed to convince him of the need for a crime-free future. JA at 70-71.

2. The record at Claiborne's sentencing establishes that the district court understood section 3553(a)'s command to exercise judgment and to impose a sentence sufficient but not greater than necessary to advance section 3553(a)'s sentencing purposes.

Section 3553(a) opens with an unambiguous command for sentencing courts to exercise judgment. "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." 18 U.S.C. § 3553(a). By making section 3553(a) the touchstone for sentencing, *Booker* freed district courts from section 3553(b)'s constraint to impose guidelines-dictated sentences, under

which necessary factual findings require specific sentence increases. *See* 543 U.S. at 245. Thus, *Booker* transformed sentencing from an arithmetic exercise – involving judicial fact-finding with mandatory consequences – to an exercise of judgment. *See Booker,* 543 U.S. at 261-62; *United States v. Crosby,* 397 F.3d 103, 111-13 (2d Cir. 2005). The sentencing process that *Booker* requires is hardly as unconstrained or as open-ended as the discretion that existed before the Sentencing Reform Act, which permitted discretion to the statutory maximum and that was essentially unreviewable on appeal. *See United States v. Jaber,* 362 F. Supp.2d 365, 370-71 (D. Mass. 2005); *see also* Douglas A. Berman and Stephanos Bibas, *Making Sentencing Sensible,* 4 Ohio St. J. of Crim. L. 37, 46-47 (2006). *Booker* imposed specific limits on district courts' sentencing discretion by requiring sentences that address and consider section 3553(a)'s purposes and factors, including the Sentencing Guidelines. *See* 543 U.S. at 245-46. Nevertheless, in post-*Booker* sentencing, the district court's ultimate, overarching duty, to balance sufficiency and necessity, demands judgment.

The record amply demonstrates that Claiborne's 15-month sentence was the product of informed and reasoned judgment. The district judge emphasized to Claiborne that she considered his crimes serious. JA at 69-70, 73. Yet, she knew that a mere three-hundredths of a gram of crack raised his statutory maximum from one year to 20 years. *See* 21 U.S.C. § 844(a). She knew that if his case involved powder cocaine rather than crack cocaine, his guideline range would have been six to 12 months. JA at 65; *see* U.S.S.G. §2D1.1. The judge was also informed that the 5.26 grams of crack Claiborne possessed was one-tenth the median amount attributed to street-level crack dealers. JA

at 19-20 (citing 2002 Report at 45). "[W]hen I compare your situation to that of other individuals that I have seen in this court who have committed similar crimes but perhaps involve a larger – much [larger] amount of drugs – and the sentences they receive I don't believe that 37 months is commensurate in any way with that." JA at 72. Thus, she reflected on the seriousness of the offense and the need to avoid unwarranted sentencing disparities. *See* 18 U.S.C. § 3553(a)(2)(A); § 3553(a)(6).

In this vein also, she voiced her concern to specifically deter Claiborne from further criminal conduct. JA at 69-70. But, she recognized Claiborne's youth: "[I]t really does disturb me when I see someone of your age in a federal courtroom about to go to prison." JA at 71. And, prompted by the same concern that led her to require him to obtain his GED and to participate in a drug program on supervised release, she sought to maximize his potential to recover from imprisonment and return to the family responsibilities that were so evidently important to him. "[W]hen I consider the quantity of drugs that are involved; the fact that you qualify for the safety valve; and your criminal history; and the likelihood of your committing further similar crimes in the future, I come to the conclusion that a 37-month sentence would be tantamount to throwing you away." JA at 72. These comments reflect the district court's judgment that just punishment and the need to protect the public from future crimes meant, in Claiborne's case, a sentence that punished without severing his family connections. She did not wish to throw away his chance to be a father, to reintegrate with his family, and to resume his family responsibilities. To that end, she tailored his sentence in light of the purposes of sentencing

in section 3553(a)(2) to ensure that he was punished sufficiently but not greater than necessary.

B. The district court's reasoned elaboration of its findings, conclusions, and judgment was reasonable under the substantial deference owed her rulings on appeal.

After Booker, the question presented when a party appeals a sentence is whether the district court's discretionary judgment embodied a reasonable application of section 3553(a) purposes and factors. *Booker*, 543 U.S. at 261. The government appealed Claiborne's sentence solely because it did not fall within the Guidelines range, but *Booker* reasonableness review is not defined by Guidelines compliance. *Id.* at 260-61. *Booker* excised section 3742(e) (main volume & 2004 ed.) specifically because it was designed to enforce the Guidelines and, therefore, was "inconsistent with the Court's constitutional requirement." *Id.* at 258. In Claiborne's case, the district court's choice of a below-Guidelines sentence was reasonable.

1. Under the deferential standard of review established in *Booker*, the district court's 15-month sentence of imprisonment was reasonable in light of section 3553(a)'s factors and the district court's stated reasons.

Booker established a practical standard of review applicable to all criminal sentences, within or without the Guidelines' advisory range. 543 U.S. at 263 (reasonableness review applies to sentences "across the board"). Appellate courts now review a district court's judgment to determine whether a sentence

> *is unreasonable*, having regard for . . . the factors to be considered in imposing a sentence, as set forth in Chapter 227 of this title; and . . . the reasons for the imposition of a particular sentence as stated by the district court pursuant to the provisions of section 3553(c).

Id. at 261 (citing 18 U.S.C. § 3742(e)(3) (1994 ed.)) (emphasis added in *Booker*).

The Court modeled this reasonableness review on the standards employed before 2003 to review (1) sentences imposed pursuant to Guidelines departures, and (2) sentences for which no mandatory Guidelines range existed, such as those imposed following revocation of supervised release. *Id.* at 261-62. The Court cited a list of cases illustrating this standard. *Id.* at 262. These cases emphasize the deferential nature of reasonableness review that *Booker* adopted. In each of the illustrative cases, the court of appeals took a "deferential appellate posture concerning issues of fact and the exercise of discretion," and upheld sentences far outside the advisory Guidelines range. *United States v. Salinas*, 365 F.3d 582, 588 (7th Cir. 2004); *see also United States v. White Face,* 383 F.3d 733, 740 (8th Cir. 2004) (affirming revocation sentences two and three times higher than the maximum guidelines sentence); *United States v. Cook,* 291 F.3d 1297, 1302 (11th Cir. 2002) (no abuse of discretion in sentence more than twice guidelines maximum in light of court's concern for rehabilitation and treatment); *United States v. Ramirez-Rivera,* 241 F.3d 37, 40 (1st Cir. 2001) (affirming 24-month sentence imposed although advisory guideline range was three to nine months). In all of these cases, the advisory range "informs rather than cabins the exercise of the district court's discretion." *Salinas*, 365 F.3d at 588. This

deferential review respects the district court's unique position at sentencing:

> Review of the reasonableness of the district court's departure from the Guidelines involves what is quintessentially a judgment call. District courts are in the front lines, sentencing flesh-and-blood defendants. The dynamics of the situation may be difficult to gauge from the antiseptic nature of a sterile paper record. Therefore, appellate review must occur with full awareness of, and respect for, the trier's superior "feel" for the case. We will not lightly disturb decisions to depart, or not, or related decisions implicating degrees of departure.

United States v. Diaz-Villafane, 874 F.2d 43, 49-50 (1st Cir. 1989) (upholding upward departure from Guidelines range); *see also United States v. Passmore,* 984 F.3d 933, 937-38 (8th Cir. 1993) (same).

In all respects with regard to § 3553(a), the district court's sentence in Claiborne's case was reasonable. Applying the standard of review *Booker* established easily supports the reasonableness of the district court's judgment, as the decision in *United States v. Jones*, 460 F.3d 191 (2nd Cir. 2006) (Newman, J.), proves. The Second Circuit does not presume the Guidelines range reasonable in its appellate review. *See id.* at 195-96; *United States v. Crosby*, 397 F.3d 103, 110-15 (2nd Cir. 2005). Instead, the Second Circuit analyzes sentences in light of the section 3553(a) factors and the district court's stated reasons, as *Booker* taught. *See id.*

In *Jones*, the Second Circuit affirmed a non-Guidelines, 15-month sentence for drug related charges. *See* 460 F.3d at 193-94. The district court justified Jones's

sentence with reasons remarkably like those given by the judge who sentenced Claiborne. *See id.* Police officers arrested Jones in possession of five bags of marijuana and three guns. *See id.* at 193. He pled guilty to being a felon-in-possession of firearms, a violation of 18 U.S.C. § 922(g), and to possessing a detectable amount of marijuana, a violation of 18 U.S.C. § 844(a), pursuant to a plea agreement stipulating a Guidelines range of 30 to 37 months. *See id.* at 193-94. Citing Jones's "work ethic" in supporting his wife and other family members, the recent death of Jones's father, Jones's attempt at college, and Jones's completion of probation for a prior offense, the district court imposed a 15-month sentence. *See id.* at 194. The judge acknowledged that he could not explain his reasoning entirely, but he had a "gut" feeling about Jones: "I still have the sense that Eric Jones is capable of doing much better." *Id.* at 194.

The district courts in both *Jones* and *Claiborne* deemed 15 months in prison sufficient punishment while boosting the odds for the defendants' successful reintegration into society. The Second Circuit easily affirmed Jones's 15-month sentence, citing the judge's discretion and expertise in determining how best to both punish and rehabilitate. *Id.* at 195. The Court noted that reasonableness is "inherently a concept of flexible meaning, generally lacking precise boundaries." *Id.*; *see also United States v. Fairclough*, 439 F.3d 76, 79 (2nd Cir. 2006). Circumstances warranting rejection of a district court's judgment as unreasonable would arise "infrequently," the Second Circuit noted, adding that Jones's 15-month sentence for the gun and drug charges was reasonable. *Id.*

The Second Circuit's standard of review correctly comprehends and applies *Booker* and fulfills the duties of

the courts of appeal in the post-*Booker* era. After *Booker,* appellate review exists to ensure the application of section 3553(a)'s factors and purposes in each case:

> The circuit courts enforce and enhance post-*Booker* requirements by evaluating the reasons offered in support of district courts' sentencing choices. Justice Breyer's opinion in *Booker* recast appellate review around the concept of "reasonableness" and explained that the provisions of § 3553(a) should "guide appellate courts . . . in determining whether a sentence is unreasonable. After *Booker,* circuit courts must ensure the exercise of reasoned judgment by district judges at sentencing; any sentencing decision that fails to thoroughly and thoughtfully address the congressional directives of § 3553(a) must be considered suspect.

Douglas A. Berman, *Reasoning Through Reasonableness,* 115 Yale L.J. Pocket Part 142, 143 (2006) (accessible at http://www.thepocketpart.org/2006/07/berman.html).

Measured by this standard of appellate review, it is apparent that the district court's choice of below-Guidelines sentence for Claiborne is reasonable. The district court reviewed information addressing all of the section 3553(a) purposes and factors, including the advisory Guidelines (which the government did not challenge on appeal). *See* JA at 55-72. The record establishes a reasoned and measured consideration of both offense and offender characteristics as section 3553(a) directs. *See id.* The district judge tailored Claiborne's sentence with an eye toward the severity of the offense, the deterrence of future crimes, and provision of correctional treatment in the most effective manner. *See* JA at 71-72. Her review evaluated Claiborne as an individual and as a person who

must return to society. Thus, she balanced sufficiency and necessity and arrived at a 15-month sentence that ensured that Claiborne was being punished without being "thrown away." *See* JA at 7. Her sentence is reasonable.

2. The court of appeals's rejection of Claiborne's 15-month sentence was premised on an erroneous understanding of *Booker* and the role of the Sentencing Guidelines.

Unlike the district court's focus on section 3553(a)'s purposes and factors, the court of appeals focused only on the Sentencing Guidelines. *See* JA at 90-91. It began from a premise that the Guidelines range took all other section 3553(a) factors into account and was, therefore, presumptively reasonable. *See* JA at 90. Relying only on a simplistic arithmetic calculation that the 15 months Claiborne received is only forty percent of the 37-month low end of the applicable guideline range, the Eighth Circuit labeled this difference an extraordinary variance. *See* JA at 90-91. It ignored section 3553(a)'s command to balance sufficiency and necessity altogether and failed even to mention the district court's judgment that 37 months would effectively extinguish Claiborne's chances of successful reintegration into his family and the community. *See id.* Further, the Eighth Circuit ruled that the district court unreasonably failed to attribute greater culpability to Claiborne based on phantom crimes for which no evidence or accusation appeared. *See* JA at 91. In sum, the court of appeals misapplied the standard of review articulated in *Booker.*

a. The Guidelines do not take the section 3553(a)'s factors and purposes into account.

Contrary to *Booker*'s admonition to anchor its review on section 3553(a) and the district court's stated reasons, the Eighth Circuit focused on just one aspect of section 3553(a), the Sentencing Guidelines. *See* JA at 90-91. It began its analysis by asserting, without citation to any authority, that the "Guidelines were fashioned taking the other § 3553(a) factors into account." *See* JA at 90. This assertion is, however, demonstrably incorrect. Rather than taking 3553(a) factors into account, the Guidelines prohibit, discourage, or restrict use of most offender characteristics even as a basis for departure. The Guidelines prohibit consideration of drug or alcohol dependence, gambling addiction, lack of guidance as a youth and similar circumstances indicating a disadvantaged background, personal financial difficulties or economic pressures on a trade or business, diminished capa[illegible]he offense involved a threat of violence or was [illegible] voluntary use of drugs or other intoxicar[illegible] sentencing rehabilitation, or single aberrant acts [illegible]he defendant has any significant prior criminal behavior even if it is too remote or inconsequential to appear in that defendant's criminal history score. *See* U.S.S.G. §5H1.4; §5H1.12; §5K2.12; §5K2.13; §5K2.19; §5K2.20. The Guidelines strongly discourage consideration of age, education and vocational skills, mental and emotional conditions, physical conditions or appearance, employment record, family ties and responsibilities, military service, charitable work, public service, or good works. *See* U.S.S.G. §5H1.1; §5H1.2; §5H1.4; §5H1.5; §5H1.6; §5H1.11. All of these factors are now directly relevant to section 3553(a)'s

command that district courts consider a defendant's history and characteristics. *See* 18 U.S.C. § 3553(a)(1).

History also refutes the Eighth Circuit's assertion that the Guidelines take the section 3553(a) factors into account. The Sentencing Commission has repeatedly acknowledged the impossibility of drafting a single set of guidelines that accounts for all potentially relevant sentencing factors. *See* U.S.S.G., Ch. 1, Pt. A.4(b); United States Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 3-4 (Oct. 2003). When the original Commissioners failed to agree about the inclusion of mitigating factors such as age, employment history and family ties, they were excluded, although this rejection was not intended as the final word. *See* Stephen Breyer, *The United States Sentencing Guidelines and the Key Compromises on Which They Rest,* 17 Hofstra L. Rev. 1, 19-20 (1988); Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited,* 11 Fed. Sent. R. 180, 1999 WL 730985 at *5 (Jan./Feb. 1999). Yet, despite research by the Sentencing Commission demonstrating that a number of factors predict a reduced risk of recidivism (age, marriage, employment, and first offender status), the Sentencing Commission has failed to add mitigating offender characteristics to the Guidelines. *See* United States Sentencing Commission, *Measuring Recidivism, The Criminal History Computation of the Federal Sentencing Guidelines* 12, 13 (May 2004); United States Sentencing Commission, *Recidivism and the First Offender* 7, 8 and Exhibit 2 (May 2004). These offender characteristics relate directly to section 3553(a)'s sentencing factors and purposes, but the Guidelines do not reflect them.

The Guidelines are not the touchstone of reasonableness and section 3553(a) permits no such special status in any of the section 3553(a) factors. In resorting to its unfounded assertion that the Guidelines account for the 3553(a) factors and presuming the Guidelines reasonable, the court of appeals in Claiborne's case chose a blunt, numeric categorization over the careful judgment and record creation the district court undertook in her sentencing of Claiborne. JA at 70-71, 90-91. It thus misapprehended both the nature of the Guidelines and its obligations under *Booker*. This error, however, permitted the court of appeals to ignore *Booker*'s direction to measure reasonableness against the whole of section 3553(a). *See* 543 U.S. at 261.

b. A presumption that the Guidelines are reasonable is inconsistent with both section 3553(a) and *Booker*.

A sentencing scheme in which the Guidelines are termed advisory but presumed reasonable is essentially identical to the sentencing system that existed before *Booker*. Before *Booker*, 18 U.S.C. § 3553(b) required district courts to impose sentences based on judicial factfinding leading to required increases in sentences unless they found grounds to depart. Thus, the Guideline range was the presumptive sentence unless a defendant qualified for a departure. *See United States v. Granderson*, 511 U.S. 39, 49 n.7 (1994) (departures from presumptive Guidelines range to statutory maximum requires extraordinary justification). *Booker* held that such a system violated Sixth Amendment rights, a defect it remedied with advisory, not presumptive, guidelines. It rendered the Guidelines advisory by excising section 3553(b) and its

requirement that district courts impose guideline sentences absent grounds for departure. *See* 543 U.S. at 259.

The Eighth Circuit's adoption and cultivation of a presumption of reasonableness artificially elevates a single factor in section 3553(a), subsection (a)(4), above all others. Neither *Booker* nor section 3553(a) grant the Guidelines such priority. *See, e.g., Booker*, 543 U.S. at 300 (Stevens, J., dissenting in part) ("the sentencing range contained in the Guidelines . . . is now nothing more than a suggestion that may or may not be persuasive to the judge when weighed against the numerous other considerations listed" in section 3553(a)); 543 U.S. at 304-05 (Scalia, J., dissenting in part) ("The statute provides no order of priority among all th[e] factors"); *United States v. Jimenez-Beltre*, 440 F.3d 514, 526 (1st Cir. 2006) (Lipez, J., dissenting) ("As a matter of statutory construction, there is nothing in the language of Section 3553(a) that justifies attributing to the guidelines 'substantial weight' in the sentencing decision."). By presuming the guidelines reasonable and reordering section 3553(a)'s language, the court of appeals demotes the purposes of sentencing in subsection (2) that Congress required sentencing courts to balance in imposing sentences sufficient but not greater than necessary to achieve these purposes. Thus, the court of appeals's presumption rewrites section 3553(a) and subordinates the judgment needed to individualize sentences through the balance of sufficiency and necessity. The presumption subordinates the balancing of section 3553(a)(2)'s purposes of sentencing to the rigid arithmetic of the Guidelines.

The coercive effect of the Eighth Circuit's presumption of Guidelines reasonableness can be seen in the presumption's evolution. Use of the presumption began as dicta in

a footnote discussing the review of within-Guidelines-range sentences. In *United States v. Marcussen,* 403 F.3d 982 (8th Cir. 2005), the court affirmed a Guidelines-range sentence in view of the section 3553(a) factors implicated by the district court's reasons. *See id.* at 985. A footnote to the court's conclusion needlessly recommended that an appellate court "ordinarily" begin with its own guidelines calculation

> to glean some reliable idea about what constitutes a proper starting point – and in many cases a resting point – toward a reasonable sentence for the particular offense of conviction and the particular defendant and to achieve one of the primary goals of the Sentencing Reform Act of 1984 to reduce disparity in the sentences imposed on similarly situated defendants. See 18 U.S.C. 3553(a)(6) (2000).

Id. at 985 n.4. Three months later in *United States v. Lincoln,* 413 F.3d 716 (8th Cir. 2005), the Eighth Circuit cited this footnote from *Marcussen* and declared that because the defendant's sentence fell within the Guidelines range, "we think that it is presumptively reasonable." *Id.* at 717. The court offered no reason for adopting this presumption in a case in which the district court had "methodically" stated the reasons for the sentence under each factor in section 3553(a). *Id.* at 717-18. For the next six months, the Eighth Circuit cited the presumption in reviewing Guidelines-range sentences, typically as general corroboration of reasonableness more directly established by the district court's stated reasons. *See, e.g., United States v. Mickelson,* 433 F.3d 1050, 1056 (8th Cir. 2006); *United States v. Tobacco,* 428 F.3d 1148, 1151 (8th Cir. 2005); *United States v. Crume,* 422 F.3d 728, 732 (8th Cir. 2005).

The presumption's force sharply expanded in *United States v. McMannus,* 436 F.3d 871 (8th Cir. 2006), in which the court of appeals reversed a below-Guidelines sentence. The Eighth Circuit released district courts from any duty to provide "robotic incantations" of section 3553(a) factors, but then it announced a rule that "the farther the district court varies from the presumptively reasonable guidelines range, the more compelling the justification based on the § 3553(a) factors must be." *Id.* at 874. The court cited 18 U.S.C. § 3553(c)(2), which requires that the district court "shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence . . . is outside the [guidelines] range . . . specific reasons for the imposition of the sentence different from that described." *Id.* In fact, section 3553(c)(2)'s plain language requires an explanation for all sentences. Nothing in the statute suggests that the district court must provide increasingly greater justification according to the degree to which the sentence varies from the Guidelines range. Nevertheless, the Eighth Circuit started citing the presumption of Guidelines reasonableness to demand that "[a]s the size of the [Guidelines] variance grows, so too must the reasons that warrant it." *United States v. Medearis,* 451 F.3d 918, 920 (8th Cir. 2006); *see also United States v. Larrabee,* 436 F.3d 890, 892 (8th Cir. 2006). Within a year of adopting this presumption the Eighth Circuit began referring to the Guidelines as something more than advisory. The Guidelines "continue to be guideposts that must be respected, lest we see a return to the unwarranted sentencing disparities that resulted in the adoption of the Guidelines themselves." *United States v. Likens,* 464 F.3d 823, 826 (8th Cir. 2006) (reversing a below-Guidelines sentence); *see also United States v. Ture,* 450 F.3d 352, 358 (8th Cir.

2006) (same); *United States v. Bryant*, 446 F.3d 1317, 1320 (8th Cir. 2006) (same).

The coercive effect of the Eighth Circuit's approach has effectively resulted in a system that declares unreasonable almost all sentences below the guidelines range. In the first 20 months after this Court decided *Booker*, the Eighth Circuit reversed 25 sentences imposed below the Guidelines range and upheld four below-Guidelines judgments. *United States v. Meyer*, 452 F.3d 998, 1000 n.3 (8th Cir. 2006) (listing cases); *United States v. McDonald*, 461 F.3d 948, 960 (8th Cir. 2006) (Bye, J., dissenting) (supplementing the list in *Meyer*). Within that same period, the court reversed only one sentence imposed within the Guidelines range. *United States v. Lazenby*, 439 F.3d 928, 933 (8th Cir. 2006). During this same period, the court of appeals upheld 16 sentences that exceeded the Guidelines range, *United States v. Meyer*, 452 F.3d at 1000 n.3; *United States v. McDonald*, 461 F.3d at 960; and reversed one, *see United States v. Kendall*, 446 F.3d 782 (8th Cir. 2006). The Eighth Circuit has suggested these figures overstate the seemingly disparate treatment in light of the greater number of below-guidelines sentences the government has not appealed in the Eighth Circuit. *See United States v. McDonald*, 461 F.3d at 956 n.7. However, the Eighth Circuit cases upholding above-guidelines sentences do not mention a presumption of reasonableness in the guidelines calculation, even when the sole basis for the departure concerns the defendant's criminal history. *See United States v. Maurstad*, 454 F.3d 787, 789-90 (8th Cir. 2006).

Thus the evolution of the Eighth Circuit's presumption of reasonableness demonstrates that it is irreconcilable with the post-*Booker* requirement of appellate review

of discretionary sentencing based on all the section 3553(a) considerations, the Guidelines being just one. *Booker*, 543 U.S. at 260-61. This Court struck a judicial presumption in parallel circumstances in *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 594 (1994). The Court ruled that a presumption against fair use founded solely on the commercial nature of a parody could not be reconciled with section 107 of the Copyright Act, because the statute listed four factors courts were to "consider" in determining whether an artistic work is fair use. *Id.* at 577. The Court explained:

> The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. . . . Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.

Id. at 577-78 (authorities omitted). This Court expressed similar concern in *United States v. Banks*, 540 U.S. 31 (2003). "[T]he Court of Appeals's overlay of a categorical scheme on the general reasonableness analysis threatens to distort the 'totality of the circumstances' principle, by replacing a stress on revealing facts with resort to pigeonholes." 540 U.S. at 42.

In this way, the Eighth Circuit's adoption of a presumption of reasonableness distorts the meaning of section 3553(a) and the reasonableness review *Booker* adopted. The presumption encourages, if it does not demand, "the sort of rote, mechanistic reliance on the Guidelines that Justice Stevens's merits opinion found constitutionally problematic." Berman, *Reasoning Through Reasonableness* at 143. Accordingly, it is inconsistent with both section 3553(a) and *Booker*.

3. The Eighth Circuit's view that district courts wield a "limited range of choice" misconstrues *Booker*'s "reasonableness" review as a means to maintain the Guideline's preeminence.

Booker did not enunciate its new "reasonableness" standard of appellate review to enhance the prominence of the now advisory guidelines. Instead, *Booker* excised 18 U.S.C. § 3742(e)'s standards of appellate review because of its cross-reference to now-excised section 3553(b) and its enforcement of mandatory guidelines through *de novo* review of decisions to depart from the guidelines. *See* 543 U.S. at 260. To fill the resulting void and preserve appellate review, the Court established a new standard requiring appellate courts "to determine whether the sentence 'is unreasonable' with regard to § 3553(a)." 543 U.S. at 261. This standard mirrored the review for reasonableness explicitly set out in the statute before 2003. *See* 543 U.S. at 260-61 (citing section 3742(e) (1994 ed.)). Thus, the Court rejected the changes to appellate review inserted by the PROTECT Act,[1] which were designed "to make Guidelines sentencing even more mandatory than it had been." 543 U.S. at 261. These amendments "ceased to be relevant" under the advisory Guideline system required by the *Booker* remedy. *Id.* Furthermore, the Court recognized that in an advisory system, the Guidelines could not predominate as they had before. The appellate review for reasonableness surviving *Booker* did not and could not be used "to provide the uniformity that Congress originally

[1] Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108-21, § 401(D)(1), 117 Stat. 670.

sought to secure." *Id.* at 263. As *Booker* made clear, "that mandatory system is no longer an open choice." *Id.*

Three months after *Booker,* however, the Eighth Circuit cited *Booker*'s adoption of appellate review for reasonableness as holding that district courts have only a "limited range of choice" in which to depart downward from the Guidelines. *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir. 2005). The court of appeals started with a proposition that *Booker*'s "reasonableness" appeared to be consistent with the "abuse of discretion" standard, which, in turn, meant that district courts' sentencing discretion was cabined by "a limited range of choice" on the facts of any case. *Id.* Citing civil appeals regarding motions to dismiss, the Eighth Circuit then declared that, "[s]imilarly, reasonableness as a constraint on a district court's discretion to depart downward [from the Guidelines] infers a limited range of choice." *Id.*

The Eighth Circuit's conclusion that this Court adopted *Booker*'s reasonableness review as a means to *limit* the district court's discretion to vary from the Guidelines betrays a basic failure to grasp the purpose for the *Booker* remedy. The limited discretion afforded district courts to impose non-Guidelines sentences lay at the heart of the Sixth Amendment violation in the Guidelines as they existed prior to *Booker*. 543 U.S. at 234 ("[T]he availability of a departure in specified circumstances does not avoid the constitutional issue. . . . In most cases . . . no departure will be legally permissible."). Far from suggesting limited discretion in the district court's options, the "reasonableness" review that *Booker* prescribed rested on a premise of greater district court discretion to evaluate and consider the broader range of issues comprehended by section 3553(a)'s factors and purposes. *See Booker*, 543

U.S. at 260-61. The examples of appellate review the Court provided manifested great deference to the district court's determination of the degree to which the court should depart. *See id.* at 262-63. In fact, the Eighth Circuit opinions reviewing pre-PROTECT Act departures stressed the heavy deference owed a district court's judgment on the degree of departure. *See United States v. Passmore,* 984 F.3d at 938; *United States v. Lang*, 898 F.2d 1378, 1380 (8th Cir. 1990) (citing district court's superior feel for the case "[w]e will not lightly disturb decisions to depart . . . or related decisions implicating degrees of departure."). The Eighth Circuit's decision that "reasonableness" review granted appellate courts the authority to second-guess the weight sentencing judges gave to, or withheld from, particular factors ignores the critical nature of *increased* district court discretion to the constitutional remedy adopted in *Booker*.

II. A requirement that sentencing judges cite extraordinary circumstances to justify a sentence that arithmetically constitutes a substantial variance from the Guidelines is inconsistent with *Booker*.

The second question that this Court posed to Claiborne is whether in determining to impose a below-Guidelines sentence, "is it consistent with *United States v. Booker,* 543 U.S. 220 (2005), to require that a sentence that constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?" The answer is no.

A. Requiring "extraordinary justification" as a threshold for non-Guidelines sentences revokes the discretion on which *Booker*'s constitutional remedy depends.

The Eighth Circuit's requirement of extraordinary justifications for downward "variances" does little more than echo the standards for downward departures that were part of the Guidelines when *Booker* was decided. *See* 18 U.S.C. § 3553(b)(1) (Supp. 2004). This departure potential failed to cure the constitutional defects in the mandatory Guidelines regime. *See Booker,* 543 U.S. at 234. Consistent with Justice Breyer's remedial opinion for the Court in *Booker,* Justice Stevens's opinion for the Court on the merits described exactly what would be necessary to make the Guidelines constitutional (in the absence of an engrafted right to jury determination of enhancing facts):

> If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment.

Id. at 233; *see also id.* at 245.

The *Booker* remedy required an "effectively advisory" Guidelines system to negate the mandatory nature of the presumptive regime in section 3553(b)(1) "that require[d] sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure)." *Id.* at 258. The limited departures allowed by Section 3553(b)(1), based on circumstances "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines" had the practical effect of making departures unavailable in most cases.

Id. at 234. Thus district courts' limited departure discretion was available in too few cases to render the system advisory in the manner that *Booker* deemed necessary to cure the Sixth Amendment violation. Similarly, the discretion possessed by Washington state trial judges in deciding whether "compelling" circumstances existed to depart from that state's Guidelines system failed to prevent the Sixth Amendment violation created by that jurisdiction's mandatory sentencing scheme. *See Blakely v. Washington*, 542 U.S. 296, 305 n.8 (2004). "The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself." *Booker,* 543 U.S. at 234.

The Eighth Circuit, however, has distorted *Booker*'s remedy by severely shrinking the discretion district courts have to impose sentences below the levels required by Guidelines-mandated and judicially-determined facts. First, the Eighth Circuit directs courts to presume the Guidelines are reasonable. *See* JA at 90. Next, the Eighth Circuit limits district courts' discretion to sentence below the Guidelines by requiring justification "'proportional to the extent of the difference between the advisory range and the sentence imposed.'" *See* JA at 90-91 (quoting *United States v. Johnson,* 427 F.3d 423, 426-27 (7th Cir. 2005)). By definition, extraordinary circumstances can exist in only a few cases. Thus, by presuming the Guidelines reasonable and then requiring extraordinary circumstances to sentence below the Guidelines, the Eighth Circuit removes the discretion essential to an advisory Guidelines system.

In fact, the prior departure standards may have allowed greater discretion than the Eighth Circuit's new

presumption of Guidelines reasonableness and extraordinary circumstances threshold for non-Guidelines sentences. Even the "mandatory" Guidelines placed "essentially no limit on the number of potential factors that may warrant a departure." *Koon v. United States*, 518 U.S. 81, 106 (1996) (quoting *Burns v. United States,* 501 U.S. 129, 136-37 (1991)). In contrast, the Eighth Circuit's approach has led it to declare that even a defendant's "dramatic" rehabilitation does not satisfy the "extraordinary circumstances" threshold. *See United States v. Lazenby*, 439 F.3d 928, 933 (8th Cir. 2006) (defendant's "dramatic" rehabilitation did not justify "extraordinary" deviation from guidelines); *United States v. Gall*, 446 F.3d 884, 889-90 (8th Cir. 2006) (same); *United States v. Medearis*, 451 F.3d at 921 (rehabilitation "cannot be allowed to trump all the other considerations listed in § 3553(a).").

Even under a mandatory Guidelines system, this Court rejected the government's effort to limit district courts' departure discretion by requiring departures to be justified by facts advancing a specific goal under section 3553(a). *See Koon,* 518 U.S. at 108. Such a limitation on departure authority is quite similar to the Eighth Circuit's "extraordinary circumstances" requirement, yet this Court rejected it. *See id.* Instead, *Koon* provided a definition of reasonableness drawn directly from section 3553(a)'s command that district courts balance sufficiency and necessity:

> The statute requires a court to consider the listed goals in determining 'the particular sentence to be imposed'. . . . The statute says nothing about requiring each potential departure factor to advance one of the specified goals. So long as the

> overall sentence is 'sufficient, but not greater than necessary, to comply' with the above-listed goals, the statute is satisfied.

Id. The crucial point is satisfying the statute, section 3553(a), for *Booker* holds that the sentencing discretion that section 3553(a) affords creates an advisory system consistent with Sixth Amendment requirements. *See* 543 U.S. at 233, 245. The Eighth Circuit frustrates and subverts the discretion essential to this advisory system's constitutionality by (1) presuming the guidelines reasonable and (2) also requiring "extraordinary circumstances" to justify arithmetically substantial variances below the Guidelines range.

B. The Eighth Circuit's requirement that substantial variances from the Guidelines be justified by extraordinary circumstances frustrates and subverts the discretion essential to an advisory Guidelines system centered on section 3553(a)'s factors and purposes.

Booker cured the Sixth Amendment problems of the mandatory Guidelines system by anchoring sentencing on section 3553(a) instead of the Guidelines. *See* 543 U.S. at 260-61. Thus, district courts acquired sentencing authority to the full extent permitted by section 3553(a). *See id.* *Booker* also anchored the appellate review process on section 3553(a), and further emphasized the importance of the district courts' sentencing discretion to an advisory Guidelines system by illustrating the appellate standard of review with highly deferential pre-*Booker* decisions. *See id.* at 262-263. These decisions recognized that sentencing involves the district court's "refined assessment of the

many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Koon*, 581 U.S. at 98. The exercise of a district court's sentencing discretion

> [i]mplies the absence of a hard-and-fast rule. The establishment of a clearly defined rule of action would be the end of *discretion*, and yet discretion should not be a word for arbitrary will or inconsiderate action. Discretion means the equitable decision of what is just and proper under the circumstances."

The Styria v. Morgan, 186 U.S. 1, 9 (1902) (internal quotations omitted) (emphasis in original). "[Discretion] takes account of the law and the particular circumstances of the case and is directed by the reason and conscience of the judge to a just result." *Burns v. United States*, 287 U.S. 216, 223 (1932) (internal quotations omitted).

The cases this Court used to illustrate post-*Booker* reasonableness review all reflected and employed such deference. See *Booker*, 543 U.S. at 262; *United States v. Salinas*, 365 F.3d at 588. The pre-PROTECT Act review of guidelines departures, to which the Court also compared post-*Booker* reasonableness standard, 543 U.S. at 261-62, likewise reflected great deference to a district court's judgments about whether to depart from the Guidelines and, particularly, the extent of departure warranted. *See, e.g.*, *United States v. Diaz-Villafane*, 874 F.2d at 49 (district court makes judgment call upon evaluation of "flesh and blood" defendant); *United States v. Lang*, 898 F.2d at 1380 (same).

The Eighth Circuit's imposition of a requirement that the district court find extraordinary circumstances to

justify sentences that vary in an arithmetically substantial way from the advisory Guidelines further distorts the deferential review that *Booker* established. *See* JA at 91. First, this requirement subjugates all other section 3553(a) factors to the cold numeric calculation of the Guidelines grid. While appellate courts may be equally capable of matching numbers on a grid, they lack the vantage to second-guess a district court's assessment of a particular sentence's effect on a living and breathing defendant's potential for rehabilitation, reintegration, and re-offending. *See United States v. Passmore,* 984 F.3d at 938. Appellate review anchored to the Guidelines effectively extinguishes the deference due the district courts' superior vantage point to gauge non-Guidelines factors.

In addition, the Eighth Circuit's focus on the arithmetical degree of variation from the Guideline produces absurd results. A term of probation, no matter how long, becomes an extraordinary, 100 percent variance, even compared to a Guidelines sentence of only 12 months. *Compare United States v. Ture*, 450 F.3d at 357 (two years probation constituted 100 percent variance from Guideline range calling for twelve-month imprisonment) *with United States v. Kicklighter*, 413 F.3d 915, 918 (8th Cir. 2005) (36 percent difference between 120-month sentence and 188-months Guideline range in methamphetamine conspiracy was within "limited range" of choice and justified by rehabilitative progress despite the defendant's "horrible" criminal history). The court of appeals accused the district court of granting Claiborne an extraordinary variance for no other reason than the mathematical calculation that 15 months varied by 60 percent from the low end of his Guideline range, which was 22 months higher. *See* JA at 91. Yet, a 10-year variance from a 360-month Guideline

sentence would only be a 33 percent variance. Moreover, the focus on the arithmetic variation skews the consideration of shorter sentences. Because such sentences deal with smaller numbers at the low end of the Guidelines grid, small variances will produce large percentage variations. *See United States v. Wallace*, 458 F.3d 606, 613 (7th Cir. 2006) (24 months less than a 25 month Guidelines term is a 96 percent variance, 24 months less than a 240 month Guidelines sentence is a 10 percent variance). The Eighth Circuit's focus on arithmetic, therefore, leads to overzealous scrutiny of short sentences in which non-Guidelines factors important to the exercise of discretion under section 3553(a) play a more significant role. *See, e.g., United States v. Likens*, 464 F.3d at 824 (reversing three years probation that judge based on defendant's non-violent background and need for drug treatment, as "extraordinary" 100 percent variance from Guidelines range of 15-21 months); *United States v. Gall*, 446 F.3d at 890 (three years probation that judge based on exemplary post-offense conduct – completing degree, starting business, and defendant's youthful immaturity when he joined drug conspiracy he abandoned – reversed because Guidelines advised 30 months prison). An arithmetically "extraordinary" variation may actually reflect the mean percentage variation that judges grant. *See United States v. Saenz*, 428 F.3d 1159, 1162 (8th Cir. 2005) (50 percent variance for substantial assistance was "extraordinary"); *United States v. Saenz*, 429 F. Supp.2d 1081, 1090-92 (N.D. Ia. 2006) (on remand) (Sentencing Commission data reveal the median percent decrease from guidelines for substantial assistance cases is 49.9 percent overall, and 45.8 percent for substantial assistance in drug trafficking cases). The anomalies invited by such categorizations of non-guidelines sentences promote the same disrespect for

criminal judgments that prompted Congress to institute guidelines in the first place. *See Mistretta v. United States*, 488 U.S. 361, 365-66 (1989).[2] *Cf. United States v. Wallace*, 458 F.3d at 613 ("We are reluctant to distill reasonableness review into a numbers game that relies only on a numerical or percentage line for reductions"; court instead orders district judge to give "World Series" explanation for "World Series" break in sentence).

Thus, contrary to *Booker*, the Eighth Circuit refocuses all sentencing consideration on the Guidelines with its (1) presumption of Guideline reasonableness, (2) requirement of extraordinary circumstances, and (3) focus on arithmetic variation from the Guidelines range. *Booker*'s excision of section 3553(b)(1), rendered the Guidelines just one of the seven factors the district court shall consider. *See* 543 U.S. at 260-261. This Court focused sentencing on section 3553(a) without dictating how district courts should resolve the interplay of the statute's purposes and factors with the facts of particular cases:

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[2] The Eighth Circuit tacitly acknowledged the folly in its mathematical categorizations in *United States v. Maloney*, 466 F.3d 663 (8th Cir. 2006). Conceding that terms like "dramatic" variance evade precise definition, the Eighth Circuit maintained the usefulness of either percentage based comparisons of sentence length, or comparisons of "the number of offense levels traversed by a variance." *Id.* at 668. The court of appeals explained that the later approach seemed "more in keeping with our assigned role to further the objectives of the Sentencing Reform Act, because the guidelines system established by the act was designed to adjust sentences incrementally by offense level, rather than percentages." *Id.* This attempt to mitigate the irrational impact of the court of appeals's percentage-based categorizations further betrays the court's misconstruction of reasonableness review as a means to enforce the former Guidelines system.

> The statute provides no order of priority among all those factors. . . . The statute – absent the mandate of §3553(b)(1) – authorizes the judge to apply his own perceptions of just punishment, deterrence, and protection of the public even when these differ from the perceptions of the Commission members who drew up the Guidelines.

Id. at 304-05 (Scalia, J., dissenting). The Eighth Circuit's application of a presumption of reasonableness in the Guidelines range and its demand for arithmetically calibrated justifications as a threshold for non-Guidelines sentences grants the Guidelines controlling dominance directly contrary to *Booker* and section 3553(a).

C. Appellate review requiring extraordinary justifications for non-Guidelines sentences inappropriately substitutes the appellate court's limited view of Guidelines' primacy for the district court's evaluation of section 3553(a)'s factors and purposes in particular cases.

The Eighth Circuit's simplistic, percentage-based analysis invites the cookie-cutter sentencing that the Sixth Amendment prohibits when predicated on judicial fact-finding. *See Booker,* 543 U.S. at 312 (Scalia, J., dissenting in part). With its requirement of extraordinary circumstances to justify substantial variances from the presumptively reasonable Guidelines, the Eighth Circuit effectively substitutes its judgment for the district court's. Claiborne's case illustrates this point.

First, the Eighth Circuit felt free to substitute its "factual" findings, by asserting, "it is a fair inference that

Claiborne distributed additional quantities of cocaine during the six months between the two occasions interdicted by the police." *See* JA at 91. No accusation, much less evidence, appeared in the record to support this assertion.[3] Even the Guidelines require a district court's findings about drug quantity to rest on a preponderance of evidence rather than extrapolation from other conduct. *See, e.g., United States v. Caldwell,* 88 F.3d 522, 527 (8th Cir. 1996) (proof that defendant trafficked in particular quantity in 1993 does not support conclusion he trafficked in same quantity each of the preceding three years).[4] Based on its presumption of Guidelines reasonableness, the *Claiborne* court dismissed two aspects of the district court's judgment – the small quantity of crack and

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[3] To qualify for the safety valve, a defendant must "not later than the time of the sentencing hearing . . . truthfully provide[] to the Government all information and evidence concerning the offense or offenses. . . ." U.S.S.G. §5C1.2(5). Claiborne sent the government a letter that the government accepted as fulfilling this requirement. *See* JA at 49-51; 54. Nothing in this letter supports the court of appeals's "fair inference." Claiborne described conduct occurring before May 14, 2003, the date he was arrested on the charge in Count One of the superseding indictment. *See* JA at 50. He then recounts how his involvement with drugs on November 3, 2003 occurred by happenstance. *See* JA at 50-51. There is nothing in the letter to suggest that Claiborne "distributed additional quantities of cocaine during the six months between the two occasions interdicted by the police." JA at 91.

[4] The Eighth Circuit's speculation that Claiborne engaged in additional crimes involving additional quantities without any evidence or accusation seems antithetical to the same basic principles of fairness and confrontation underlying *Booker* and *Blakely v. Washington*, 542 U.S. 296, 301-302 (2004). An appellate court's invocation of phantom crimes lacking even an initial complaint cannot be what Congress intended as "real conduct" relevant to sentencing. *Booker*, 543 U.S. at 252. *Compare Washington v. Recuenco*, 126 S. Ct. 2546, 2557 (2006) (Ginsburg, J., dissenting) (defendant charged with one crime was convicted of another, "*sans* charge, jury instruction, or jury verdict").

Claiborne's clean criminal record – as sufficiently accounted for by the Guidelines. *See* JA at 91. This reasoning, however, simply replicates the pre-*Booker* evaluation of departures found in section 3553(b), which *Booker* excised. Indeed, in asserting that "'[a]n extraordinary reduction must be supported by extraordinary circumstances,'" the *Claiborne* court quoted an appellate review of a departure from a Guidelines sentence for substantial assistance under U.S.S.G. §5K1.1. *See* JA at 91 (quoting *United States v. Dalton,* 404 F.3d 1029, 1033 (8th Cir. 2005)). Thus, the Eighth Circuit treated the district court's judgment as failing to establish a "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. . . ." 18 U.S.C. § 3553(b). The court of appeals substituted its judgment presuming reasonableness in the Guidelines for the district court's reasoning and judgment. *See* JA at 90-91. This substitution is entirely inconsistent with the *Booker*-required deference. *See* 543 U.S. at 262.

The reasonableness review *Booker* retained, consistent with the pre-2003 version of Section 3742(e), does not authorize an appellate court to "substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence." *Koon*, 518 U.S. at 97 (quoting *Solem v. Helm,* 463 U.S. 277, 290 n.16 (1983)). Appellate courts lack the institutional advantage of the district court in assessing the capacities of the living and breathing person who will bear the judgment chosen. *See United States v. Diaz-Villafane,* 874 F.2d at 49. Dissenting from the Eighth Circuit's application of its presumption of Guidelines reasonableness and extraordinary circumstances requirement, one judge vividly illustrated this point:

> In his tenure as a federal district judge, Judge Pratt has sentenced approximately nine hundred ninety offenders. We have reviewed only a minuscule number of those cases. Judge Pratt has had the experience to decide the fate of more than nine hundred real people, all of whom he has looked in the eye when imposing a sentence.

United States v. Likens, 464 F.3d at 827 n.1 (Bright, J., dissenting).[5] The district judge in Claiborne's case obviously relied on her similarly long experience in sentencing in many cases, only a minuscule number of which reached the court of appeals, when she compared Claiborne's situation to other individuals she had sentenced for similar crimes. JA at 72. Yet, the Eighth Circuit dismissed this institutionally superior experience merely by reference to the Guidelines. *See* JA at 90-91.

Notwithstanding the appellate courts' deficient vantage to make such evaluations, the Eighth Circuit's reversal of below-Guidelines sentences increasingly include categorical declarations that rehabilitative needs do not justify "dramatic" or "extraordinary" variances. *See McMannus*, 436 F.3d at 875 ("While we can identify factors that may warrant a minor variance from the guidelines range, e.g., McMannus put himself through community college while on pretrial release, see 18 U.S.C. § 3553(a)(1),

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[5] Section 3553(a) requires sentencing courts "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Because courts of appeal see only a relatively small number of cases, they are in a poor position to determine whether sentences constitute unwarranted disparity. The government's ability to select the cases it chooses to appeal also skews the ability of the courts of appeal to know what is actually happening at the district court level. *See McDonald,* 461 F.3d at 956 n.7.

we find nothing in the record which would justify a variance of this magnitude under § 3553(a)."); *United States v. Lazenby*, 439 F.3d at 933 (defendant's "dramatic" rehabilitation did not justify "extraordinary" deviation from Guidelines); *United States v. Gall*, 446 F.3d at 889-90 (district court gave too much weight to defendant's withdrawal from conspiracy, too little weight to the danger of the crime, and too much emphasis on defendant's post-offense rehabilitation); *United States v. Medearis*, 451 F.3d at 921 (defendant's rehabilitation "cannot be allowed to trump all the other considerations listed in § 3553(a)"). These broad judgments go well beyond the deferential review for reasonableness prescribed in *Booker* and materially inhibit non-Guidelines judgments.

Out of constitutional necessity, *Booker* chose an advisory Guidelines system that makes the informed discretion of district courts paramount.

> *Booker* and § 3553(a) thus demand that federal sentencing judges exercise reasoned judgment by filtering the Guidelines' advice through the provisions of § 3553(a); by doing so, district judges avoid giving any particular judge-found fact a "determinate" role in calculating the sentence, and thereby avoid the constitutional problem identified in *Booker*.

Berman, *Reasoning Through Reasonableness* at 142-43. In Claiborne's case, the district court's judgment fully and reasonably complied with each portion of section 3553(a), including the required consideration of the advisory Guidelines range. The district judge rationally explained her judgment that the Guidelines range was excessive in light of her own experience and the nature and circumstances of Claiborne's crimes and the history and characteristics of Claiborne himself. She also expressed her belief

that a 15-month sentence was sufficient but not greater than necessary to satisfy section 3553(a)'s sentencing purposes. In substituting its judgment for the district court's, the Eighth Circuit ignored the district court's concern that a Guidelines sentence would be tantamount to throwing Claiborne away, pointing to nothing as a basis for disagreement other than the Guidelines, its presumption of reasonableness, and its requirement of extraordinary circumstances to justify "extraordinary" variances from the Guidelines. Nothing in *Booker* sanctions this usurpation of constitutionally necessary sentencing discretion.

CONCLUSION

For the foregoing reasons, Claiborne respectfully requests that the Court reverse the court of appeals and remand with directions to affirm the district court's judgment and sentence.

Dated December 18, 2006.

Respectfully submitted,

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STATUTORY ADDENDUM

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.– The court shall impose a sentence sufficient, but not greater than necessary to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant;

and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(b) Application of guidelines in imposing a sentence. –

(1) In general. – Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses – [omitted].

18 U.S.C. §3553(c) Statement of reasons for imposing a sentence. – The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

> **(1)** is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or
>
> **(2)** is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

18 U.S.C. §3661. Use of information for sentencing

> No limitation shall be placed on the information concerning the background, character, and conduct of a

person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 3742. Review of a sentence

(e) Consideration. – Upon review of the record, the court of appeals shall determine whether the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that –

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(c) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

21 U.S.C. §841(a), (b)(1)(C)

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of

supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which

may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a

violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

21 U.S.C. §844(a)

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or

intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains

cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of Title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of Title 18 that the defendant lacks the ability to pay.